IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
JIMMIE DAL ROSE AND	§	CASE NO. 97-50329-13
KIMBERLY RENEE ROSE,	§	
	§	
Debtors.	§	

IN RE:	§	
	§	
CURT MASTERS,	§	CASE NO. 98-51016-13
	§	
Debtor.	§	

MEMORANDUM OPINION

In each of the above cases, hearing was held to consider approval of plan modifications filed by the above Debtors.[1] The Chapter 13 Trustee (the Trustee) submitted orders approving the modifications which contained the following provision:

> That one year from the date of modification, the Debtors' attorney will file a report with the Court regarding the Debtors' then current activities and income.

This provision was stricken by Debtors' counsel. The Trustee then submitted another order which contained the following slightly revised provision:

> That one year from the date of modification, the Debtor will report to the Trustee his then current activities and income.

The Trustee insists that such provision be included in all orders confirming or modifying any plan that provides a payout to unsecured creditors of 20%-or-less. The Debtors, through counsel, oppose

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[1]The court will refer to Mr. and Mrs. Rose and Mr. Masters collectively as the "Debtors".

such provision.

This court has jurisdiction of this matter under 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2). This Memorandum Opinion contains the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

The Trustee contends the disposable income requirement under § 1325(b)(1)(B) and the court's equitable powers derived from § 105 provide ample authority for including the provision. The Trustee argues the provision is necessary to facilitate the Trustee's continuing obligation to monitor any changes in the Debtors' income or expenses. The Debtors contend there is no authority in the Code or the Rules authorizing such a provision. They argue the provision is redundant because they are already required to devote all projected disposable income to the plan. In addition, Debtors' counsel submits that if the provision is required, counsel should receive additional attorney's fees incurred in insuring the Debtors comply with the provision. Debtors' counsel is also concerned that the provision will result in direct communications between the Trustee and the Debtors, without input from Debtors' counsel. This arises, in part, from the wording of the proposed provision. In this regard, the court views the provision as requiring the filing of updated Schedules I and J[2], not as a means by which there is any improper communication between the Trustee and the Debtors.

The plan in the Masters' case is a 60-month plan originally confirmed June 15, 1999. It projected a 24.68% distribution to unsecured creditors. The modification presently before the court

[2]Schedule I reflects the debtor's and debtor's spouse's current income; Schedule J reflects the debtors' current expenditures.

proposes to defer four payments to the end of the plan, with the distribution to unsecured creditors reduced to 8.68%.

The plan in the Rose case was confirmed May 11, 1998, also as a 60-month plan. It projected a 28.57% distribution to unsecured creditors. The modification defers four payments and reduces the monthly payments under the plan from $503.00 a month to $401.00 a month. The projected distribution to unsecured creditors is reduced to 8.63%.

Section 105(a) of the Code allows the court to issue any order that is "necessary or appropriate to carry out the provisions of this title". 11 U.S.C. §105(a). It does not create new substantive rights. *United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986); *In re NWFX, Inc.*, 864 F.2d 588 (8th Cir. 1988). The court must, therefore, look to other provisions of the Code to determine whether there is authority for requiring the Debtors to provide updated Schedules I and J one year from their respective modification. There are several provisions of Chapter 13 that potentially impact on this issue.

Section 1322(a)(1) of the Code states that a plan shall "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan". Section 1322(d) states that a plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

Section 1325 of the Code sets forth the requirements of confirmation, including the disposable income requirement set forth at (b)(1)(B) of such section.

Section 1329 addresses modification of a plan after confirmation and specifically provides that a plan may be modified upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, and may provide for an increase or a reduction in the amount of payments to a particular class.

The Trustee argues that the disposable income provision of § 1325(b)(1)(B) justifies the filing of updated Schedules I and J. If, for example, the updated Schedules I and J reveal a debtor's income has increased significantly, the Trustee may move to modify the plan to increase payments to unsecured creditors thereby insuring the debtor is in fact dedicating all disposable income to the plan. This assumes the disposable income requirement applies upon modification. However, the issue of whether the § 1325(b)(1)(B) "disposable income" test is applicable to

§ 1329 modifications is presently unsettled under the law. Section 1329 states:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
>
> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
>
> (2) extend or reduce the time for such payments; or
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.
>
> (b) (1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.
>
> (2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.
>
> (c) A plan modified under this section may not provide for payments over a period that

> expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

A cursory reading of the section indicates that § 1325(b)(1)(B), the portion of § 1325 that embraces the "disposable income" test, has been specifically excluded from § 1329(b)(1) which states expressly that §§ 1322(a), 1322(b), and 1323(c) must be complied with as well as the requirements of § 1325(a). Many courts have held that a debtor's disposable income should not be reexamined upon a requested plan modification. *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000) ("disposable income" test does not apply to modifications of confirmed Chapter 13 plans); *In re Burgie*, 239 B.R. 406 (9th Cir. BAP 1999) (summarizing § 1329 and recognizing that it does not reference § 1325(b)); *In re Forbes*, 215 B.R. 183 (8th Cir. BAP 1997) (holding the disposable income test does not apply to plan modifications); *In re Woodhouse*, 119 B.R. 819 (Bankr. M.D. Ala. 1990) (unless there are substantial unanticipated changes in the debtor's ability to pay under a plan already confirmed, the rights of the debtors and the creditors are settled at the date of confirmation and ought not to be disturbed in modification proceedings relating to disposable income).

Notwithstanding, Collier on Bankruptcy states that "if the trustee or the holder of an unsecured claim objects to a modification proposed by the debtor, then the ability to pay test of § 1325(b) must *probably* be satisfied as well." COLLIER ON BANKRUPTCY ¶ 1329.05[3] (15th ed. 2000) (emphasis added). Collier states that the omission of § 1325(b) from the list in § 1329(b)(1) was probably a legislative oversight. *Id.* Some courts have held that the language in § 1325(a)(1) makes § 1325(b) applicable. *See, e.g., In re Baker*, 194 B.R. 881, 884 (Bankr. S.D. Cal. 1996). Section 1325(a)(1) states "[E]xcept as provided in subsection (b), the court shall confirm a

plan if – (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title." Section 1325(b) is an "other applicable provision of the chapter" and, thus, must be complied with. Moreover, it has been argued that applying the projected disposable income test at confirmation of a modified plan would "go a long way to eliminating the 'danger' that a Chapter 13 debtor would experience a significant improvement in financial condition after confirmation of the original plan and not share that good fortune with pre-petition creditors." *In re Martin*, 232 B.R. 29, 37 (Bankr. D. Mass. 1999).

Given the precise issue before the court, the court is not inclined to resolve the question of whether the disposable income test applies upon modification. Despite this, whether to approve a modification is discretionary with the court and, thus, the court must weigh many factors when considering whether to approve a modification. *See In re Sounakhene* at 805. And, regardless of one's position on whether the disposable income test applies at modification, the court's consideration of a debtor's income and expenses at the time of a proposed modification is appropriate to prevent potential abuses of the Bankruptcy Code. *See Woodhouse*, 119 B.R. 819 (holding that the confirmation order is res judicata on the disposable income test, except in extraordinary circumstances); *see also In re McCray*, 172 B.R. 154, 158 (Bankr. S.D. Ga. 1994) (holding the disposable income test applies to plan modifications in extraordinary circumstances to prevent abuse of the Bankruptcy Code).

As in the instant cases, this court approves numerous modifications that reduce payments to creditors because of changed circumstances resulting from reduced income or increased expenses. On the flip side, if the debtor's income increases dramatically (or expenses are reduced significantly),

should the plan be modified to increase payments on the basis the debtor's actual disposable income is greater than the projected disposable income?

The Trustee is obligated to investigate the financial affairs of the Debtors. 11 U.S.C. § 1302(b)(1). Moreover, the Code anticipates modifications being filing by a trustee, as well as increasing or reducing payments to creditors under a plan. 11 U.S.C. § 1329. At the very least, a requirement that the Debtors file amended Schedules I and J will assist the Trustee in fulfilling his duties. The requirement is sought only in those cases in which the proposed payout to unsecured creditors is 20%-or-less. While a 20%-or-less line appears arbitrary, it is reasonable to assume that such cases, being low percentage plans, are typically the type of cases that deserve closer scrutiny. This requirement does not strike the court as overly burdensome or unreasonable. As stated above, the court construes the proposed provision as requiring the filing of updated Schedules I and J. Therefore, a provision requiring the filing of updated Schedules I and J one year from date of the modification in each of these cases will be approved. A simple updating of Schedules I and J can be done without significant time being expended by Debtors' counsel. Debtors' counsel may charge such additional fees as counsel presently charges for filing amended schedules. The Trustee and Debtors will be directed to submit, within fifteen days, an appropriate order, consistent with this Memorandum Opinion, approving the plan modifications in each of the styled cases.

Signed February 20, 2001.

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Robert L. Jones
UNITED STATES BANKRUPTCY JUDGE